



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable John S. Rudd, Jr.
Actuary and Assistant Director
Teacher Retirement of Texas
Austin, Texas

Dear Sir:

Opinion No. O-4332
Re: Disability retirement of
member engaged in gain-
ful occupation

We have received your letter of January 15, 1942,
which we quote as follows:

"The Retirement System desires to know whether it would be proper for the State Board of Trustees to retire a member on a disability retirement allowance in accordance with Section 5, Subsection 3 of the Retirement Law in the event the member, at the time of such retirement, is engaged in a gainful occupation other than teaching, provided that the amount earnable by the member in such gainful occupation, together with the amount of the retirement allowance does not exceed the compensation last received by the member as a teacher."

Subsections 3 and 5(a) of Section 5 of the Teacher Retirement Act (Article 2922-1, Vernon's Annotated Civil Statutes) read as follows:

"3. Disability Retirement Benefits

"Upon the application of a member or his legal representative acting in his behalf, any member who has had twenty (20) or more years of creditable service may be retired by the State Board of Trustees, not less than thirty (30) and not more than ninety (90) days next following the date of filing such application, on a disability retirement

allowance, provided that the Medical Board, after a medical examination of such member, shall certify that such member is mentally or physically incapacitated for the further performance of duty, that such incapacity is likely to be permanent, and that such member should be retired."

"* * *

"5. Beneficiaries Retired on Account of Disability.

"Once each year during the first five (5) years following retirement of a member on a disability retirement allowance, and once in every three-year period thereafter, the State Board of Trustees may, and upon his application shall, require any disability beneficiary who has not yet attained the age of sixty (60) years to undergo a medical examination, such examination to be made at the place of residence of said beneficiary or any other place mutually agreed upon, by a physician or physicians designated by the State Board of Trustees. Should any disability beneficiary who has not yet attained the age of sixty (60) years refuse to submit to at least one medical examination in any such periods by a physician or physicians designated by the State Board of Trustees, his allowance shall be discontinued until his withdrawal of such refusal, and should his refusal continue for one year, all his rights in and to his allowance shall be revoked by the State Board of Trustees.

"(a) Should the Medical Board report and certify to the State Board of Trustees that such disability beneficiary is no longer physically or mentally incapacitated for the performance of duty, or that such disability beneficiary is engaged in or is able to engage in a gainful occupation, and should the State Board of Trustees by a

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majority vote concur in such report, then the amount of his allowance shall be discontinued or reduced to an amount by which the amount of the last year's salary of the beneficiary, as a teacher, exceeds his present earning capacity. Should his earning capacity be later changed, the amount of his allowance may be further modified; provided, that the revised allowance shall not exceed the amount of the allowance originally granted, nor shall it exceed an amount which, when added to the amount earnable by the beneficiary, equals the amount of his compensation for the last year prior to retirement."

Subsection 3 provides the conditions upon which a member may be retired on a disability retirement allowance; namely, "that the Medical Board after a medical examination of such member, shall certify that such member is mentally or physically incapacitated for the further performance of duty, that such incapacity is likely to be permanent, and that such member should be retired." (Emphasis supplied.) "Duty" as used in the statute obviously means that duty by virtue of which the person is a member of the Retirement System. Therefore, if the Medical Board reaches the conclusion that the member is incapacitated for further teaching and certifies the same in accordance with the statute, we are of the opinion that the State Board of Trustees may retire the member because of such disability.

Subsection 5(a) deals with a person who was retired on account of disability but who is now no longer so incapacitated or engaged or able to engage in a gainful occupation. The Board of Trustees is authorized to reduce the allowance of such a person now engaged in a gainful occupation to an amount by which the last year's salary of the beneficiary, as a teacher, exceeds his present earning capacity. In other words, the allowance shall not be greater than the amount when added to his present earning capacity equals his last year's salary as a teacher.

Does this provision prevent the Board of Trustees from retiring a member physically or mentally incapacitated from teaching because he is engaged in some gainful occupation? We think not. Section 3 does not state that the

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member must not be so engaged, and we are not authorized, nor do we feel that we should read it into the statute. There would be no reason to distinguish between a member engaged in a gainful occupation at the time of retirement, and one who is not but who later becomes so engaged, and penalize the former. We do believe, however, that Section 5(a) sets the maximum allowance of such person.

In view of the foregoing, it is the opinion of this department that the State Board of Trustees of the Teacher Retirement System is authorized to retire a member, who is physically or mentally incapacitated from the further performance of his duty as a teacher, on a disability retirement allowance under Subsection 3, Section 5 of the Teacher Retirement Act even though such member is engaged in a gainful occupation at the time of retirement; however, the allowance of such member shall not be more than that amount which when added to the amount earnable in such gainful occupation exceeds his last year's compensation as a teacher.

Very truly yours

ATTORNEY GENERAL OF TEXAS

BY

George W. Sparks
George W. Sparks
Assistant

APPROVED JAN 23, 1932

John S. Rudd, Jr.

GWS:ff

